Supreme Court, U.S.
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NO. 89-1998

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

JOSEPH SLOMNICKI
Petitioner

V.

ALLEGHENY COUNTY HEALTH DEPARTMENT
Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

BRIEF FOR RESPONDENT

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JURISDICTION

This is an appeal from the Pennsylvania Supreme Court denying both a Petition for Allowance of Appeal, dated July 19, 1989, and a subsequent Petition for Reconsideration, dated March 14, 1990, from the judgment of the State Appellate Court (Commonwealth Court of Pennsylvania).

On January 10, 1989, the Commonwealth Court of Pennsylvania affirmed Petitioner's summary conviction for violations of the Allegheny County Health Department Regulations promulgated under the requirements of the Local Health Administration Law, Act 315 of August 24, 1951, P.L. 1304 Sec. et seq., as amended 16 P.S. 12001 et seq.

Respondent respectfully contends that the Supreme Court of the United States does not possess jurisdiction to hear this

appeal. The issues raised by the Petitioner do not involve any grounds repugnant to the Constitution, Treaties, or laws of the United States as required by 28 U.S.C. Sec. 1257(a), as amended by the Supreme Court Case Selections Act of 1988, June 27, P.L. 100-352, Sec. 3, 102 Stat. 662, in order for this Court to have jurisdiction.

To strengthen this argument Respondent would like to bring to the attention of this Honorable Court that the issues raised by the Petitioner do not fall into the array of considerations outlined in Rule 10 of the Supreme Court Rules entitled, Considerations Governing Review on Writ of Certiorari. In addition, several of the issues presented to this Court by Petitioner were never raised in the lower Courts.

STATEMENT OF THE CASE

The facts of this case are somewhat complicated owing to the fact that there have been four (4) separate appeals to Common Pleas Court by Petitioner pertaining to this same residential property and three (3) Commonwealth Court appeals from the Allegheny County Common Pleas Court decisions. The pertinent facts are as follows:

On July 9, 1985, an Allegheny County Health Department official received a complaint pertaining to housing conditions at a property owned by Joseph Slomnicki (Petitioner) at 3101 Niagara Street, Pittsburgh, Pennsylvania. The complaint was made by the tenant who occupied the property in question.

On July 12, 1985, an Allegheny County Health Department inspector appeared at the

premises, identified himself to the adult occupant, and was willfully admitted for the purposes of making a health inspection. At that time a number of conditions were noted that identified twenty (20) separate violations of Allegheny County Health Department Rules and Regulations, Article VI, "Houses and Rooming Houses".

On July 19, 1985, Allegheny County Health Department sent to Petitioner, by regular mail, to his home address a letter and inspection form advising him of the conditions noted on the July 12, 1985, inspection and giving him thirty (30) days in which to correct the noted violation. The orders were never returned by the Post Office as undelivered.

On September 3, 1985, after the thirty (30) day period to correct had expired, a follow-up inspection was conducted by the same Allegheny County Health Department

inspector and all previously identified violations remained the same.

On November 22, 1985, and January 31, 1986, additional inspections by the Allegheny County Health Department inspector were conducted and all conditions remained the same.

All inspections were made in the presence and with the consent of the adult occupant of 3101 Niagara Street who also produced a lease and rent receipts signed by Petitioner for the premises at 3101 Niagara Street.

On March 5, 1986, Allegheny County Health Department filed a summary complaint in front of the City of Pittsburgh Housing Court.

At the conclusion of the City of Pittsburgh Housing Court trial of April 30, 1986, Petitioner was found guilty of the violations charged and sentenced to pay a

fine of nineteen hundred dollars ($1900.00) plus costs.

On May 7, 1986, Petitioner appealed his conviction of April 30, 1986, to the Common Pleas Court of Allegheny County, whereby his conviction was affirmed on July 7, 1988.

Subsequently, Petitioner filed an appeal with the Commonwealth Court of Pennsylvania on September 26, 1988. The Commonwealth Court of Pennsylvania affirmed the Common Pleas Court of Allegheny County by an Order dated January 10, 1989.

Petitioner filed an Allowance of Appeal and a Petition for Reconsideration to the Pennsylvania Supreme Court, both of which were denied on July 19, 1989, and March 14, 1990, respectively.

ARGUMENT

A. AT ALL TIMES THE INSPECTION PROCEDURES USED BY ALLEGHENY COUNTY HEALTH DEPARTMENT IN THIS MATTER WERE A REASONABLE EXERCISE OF ITS POLICE POWERS UNDER LAW AND REGULATION.

As indicated previously, this issue does not fall within the parameters of 28 U.S.C. Sec. 1257(a). Therefore, this Court should not consider it for lack of jurisdiction.

The issues raised by Petitioner as to alleged improper searches by Allegheny County Health Department are severely misplaced. The only premises inspected by Allegheny County Health Department staff in this matter were those leased by Petitioner to others for residential occupancy. The record (T. pp 10-12) is uncontroverted in that the inspections were consentual, even

requested, by the valid occupant of the premises.

Allegheny County Health Department Rules and Regulations, Article VI, "Houses and Rooming Houses", at section 606 specifies:

> "606. Entry and Inspection of Dwellings.
>
> A. Subject to the limitations of the Constitutions of the United States and of the Commonwealth of Pennsylvania, and in order to carry out the purpose and provisions of this code the Director, upon showing proper identification of office, may enter and inspect any dwelling at all reasonable times and in any emergency at any time. The owner, operator or occupant of any dwelling shall give the Director

free access for the purpose of such inspection."

Further, the Local Health Administration Law at Section 12012(c) states:

> "The health director and his authorized subordinates may enter and inspect at reasonable times and in a reasonable manner any places or conditions whatsoever within the jurisdiction of the county department of health for the purpose of enforcing the health laws, rules and regulations of the Commonwealth and the county department of health, and for the purpose of examining for, and abating nuisances detrimental to the public health."

It is well established that property rights are not absolute and that persons

hold their property "subject to valid police regulation, made, and to be made, for the health and comfort of the people..." DePaul v. Kaufman, 441 PA 386, 272 A.2d 500 (1971); Nolan v. Jones, 263 PA 124, 131, 106 A. 235, 237 (1919); Village of Euclid v. Ambler Realty Co. 272 U.S. 365, 114 (1926).

A landlord assumes certain duties in his role. This is especially true where the property rented is for a dwelling unit. Justice Holmes clarified this concept as early as 1921: "housing is a necessity of life. All the elements of a public interest justifying some degree of public control are present." Block v. Hirsch, 256 U.S. 135, 156 (1926).

The cases Petitioner cites in his Brief to this Court, do not directly address the issues as they pertain to the facts of the case at Bar.

In Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), the Appellant was a lessee of a ground floor apartment building. An inspector from the Division of Housing entered the apartment building for a routine annual inspection. The manager of the apartment building allowed the inspector to enter the premises. It was the manager who indicated that the Appellant was using the ground floor of the leasehold as a personal residence. Such use of a ground floor leasehold was not permitted under City regulations. Hence, the inspector asked Appellant if he could enter Appellant's leasehold. The Appellant denied the inspector's request. Then Appellant demanded to see a search warrant. The inspector did not possess one, but proceeded to cite Appellant for not complying with a

City Regulation giving inspectors the power to conduct warrantless searches.

It is Respondent's belief that without being aware of the above facts, Petitioner's quote from Camara may be severely misplaced. Respondent does not dispute the holding in Camara, i.e., that administrative searches must be consentual if the administrative agency lacks a search warrant. However, Respondent strongly objects to applying Camara to the case in question.

The most distinguishing factor from the case before this Court and Camara is the fact that Petitioner's tenant gave his/her consent to the Allegheny County Health Department inspector to enter the apartment leasehold each and every time the inspector inspected the leasehold. In fact, it was the tenant who made the complaint to Respondent regarding the poor living

conditions of the leasehold. In Camara the Court said:

> "Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reasons for securing immediate entry." (Emphasis added)
>
> Camara 387 U.S. 523, 539.

In U.S. v. Matlock, 415 U.S. 164 (1974), defendant was arrested, charged and subsequently convicted of bank robbery from evidence obtained during a search of

defendant's leasehold. The police were given consent to search defendant's leasehold in his absence by defendant's girlfriend, who also shared the leasehold with defendant. In Matlock this Court said:

> "...when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." (Emphasis added) Matlock 415 U.S. 164, 171.

In light of Camara and Matlock, it was not necessary for Respondent to obtain a search warrant in this particular case, nor

was it necessary to obtain Petitioner's consent to enter one of his tenant's leaseholds since the tenant who occupied the leasehold in question requested and subsequently allowed an Allegheny County Health Department inspector to enter the leasehold. It is Respondent's contention that the tenant in the case at Bar possessed "common authority" over the premises, or at the least a "sufficient relationship" to the premises to consent to a warrantless search of Petitioner's property.

Hence, Respondent has not violated the Fourth Amendment of the United States Constitution or any other law as the Petitioner attempts to argue.

B. A VALID RULE AND REGULATION OF THE ALLEGHENY COUNTY HEALTH DEPARTMENT IS ENFORCEABLE AS TO THE LANDLORD OF A

RESIDENTIAL PREMISE REGARDLESS OF THE PRIVATE CONTRACT THAT MIGHT EXIST BETWEEN THE LANDLORD AND THE TENANT.

This issue does not involve any constitutional question, nor does it involve any of the pre-requisites required by 28 U.S.C. Sec. 1257(a) in order to confer jurisdiction to this Court. For these reasons, Respondent respectfully asserts that this Court does not have jurisdiction to hear this issue.

It has been settled by the Commonwealth Court of Pennsylvania that a valid rule and regulation of the Allegheny County Health Department is enforceable as to the landlord of a residential premises regardless of the private contract that might exist between the landlord and the tenant. Slomnicki v. Allegheny County Health Department 538 A.2d 122 (1988).

On January 1, 1957, pursuant to Section

12005 of the Local Health Administration Law, Act 315, August 24, 1951, as amended, P.L. 1304, 16 P.S. 12001, Allegheny County Health Department was created.

At Section 12010 of the Local Health Administration Law, powers and duties of county departments of health are enumerated. At subsection (f) of that section it states that county health departments:

> "shall make and enforce such rules and regulations, subject to the approval of the county commissioners or, in the case of a joint-county department of health the joint-county health commission, and institute such programs not inconsistent with law as may be necessary for the promotion and preservation of the public health." (Emphasis added)

Further, at Section 12011(c) of the Local Health Administration Law, the powers and duties of the Board of Health are outlined. Section 12011(c) states:

> "The Board of health shall exercise the rule-making power conferred upon the county department of health by the formulation of rules and regulations for the prevention of disease, for the prevention and removal of conditions which constitute a menace to health, and the public health generally. Rules and regulations formulated by the board of health shall be submitted to the county commissioners or, in the case of a joint-county department of health, to the joint-county health commission, for approval or

rejection. With thirty (30) days after the receipt of the rules and regulations, the county commissioners or the joint-county health commission, as the case may be, shall give written notice to the secretary of the board of their approval or rejection." (Emphasis added)

It is clear from these two sections of the Act that it was the intention of the Pennsylvania Legislature to give broad regulatory powers to county health departments, not only to remove unhealthful conditions, but further to prevent such conditions and to promote the health of the public generally.

Pursuant to the Local Health Administration Law, the Allegheny County Health Department adopted Allegheny County Health Department Rules and Regulations

Article VI, "Houses and Rooming Houses", effective January 1, 1957.

Sections 621 and 626 of Allegheny County Health Department Rules and Regulations Article VI assess responsibility for repair of certain aspects of residential housing to the owner occupant or one who "lets to another for occupancy" a residential dwelling unit.

Respondent does not dispute the fact that a landlord may enter into a valid and enforceable agreement with his tenant to make repairs of a leased premise. Such agreements, however, do not absolve the landlord from potential summary criminal prosecution under the applicable County regulation.

Respondent, who is not a party to the lease or its provisions, cannot be held to the provisions of said lease as to enforcement against the landlord.

An owner of land and structures thereon may not contract away (as to the County) his duty to maintain his land and buildings in conformity with any valid, existing laws, rules and/or regulations pertaining to property and property owners. Thus, the Petitioner (as to the municipality) retained the responsibility for operating his improved land in accord with the Rules and Regulations of Allegheny County Health Department.

In fact, Judge Barbieri, of the Pennsylvania Commonwealth Court, in a previous appeal by Petitioner for the same property, interpreting the same lease with the same issue wrote:

> "Although the tenant may indeed be responsible under the lease for payment to the landlord for repairs which are necessary to abate the violations, the landlord

is responsible to the Department for ensuring that the violations are actually abated. Appellant may not contract such responsibility away to a third party. His only remedy is to enforce the terms of the lease agreement by requiring the tenant to pay for necessary repairs and alterations."

Slomnicki v. Allegheny County Health Department 538 A.2d 122 (Pa. Commonwealth 1988).

C. SEPARATE ACTIONS BY ALLEGHENY COUNTY HEALTH DEPARTMENT CAN BE BROUGHT FOR SIMILAR VIOLATIONS ON DIFFERENT DAYS.

The issue of double jeopardy was not raised by the Petitioner at the Common Pleas Court of Allegheny County either by brief motion or argument. It was not until

Petitioner reached the Pennsylvania Appellate Court (Commonwealth Court of Pennsylvania) that he attempted to raise this issue. Accordingly, the Commonwealth Court of Pennsylvania did not even consider the question of double jeopardy. Respondent, therefore, contends that the Supreme Court of the United States lacks jurisdiction to hear this issue for it is not properly before this Court.

Under Allegheny County Health Department Rules and Regulations, Article VI, "Houses and Rooming Houses", the existence of a condition is only a violation if the premise in question is occupied. It is logical, therefore, that the continued occupancy (emphasis added) constitutes a fresh violation.

Additionally, Article VI, "Houses and Rooming Houses", a Rule and Regulation of Allegheny County Health Department, duly

promulgated under the Local Health Administration Law, Act 315, August 24, 1951, P.L. 1304 Sec. et seq., as amended, 16 P.S. 12001 et seq., specifies at Section 664(c):

> "Separate Offenses - For the purpose of this section, violations on separate days shall be considered separate offenses. Each violation of any separate subsection or section of this article shall constitute a separate offense."

Further, the Local Health Administration Law itself, at Section 12027(c) specifies that any person who violates a rule and regulation of a county health department on separate days shall be considered separate offenses.

For this reason it is clear that a previous conviction is not a bar to a

conviction under identical or similar violations on different dates.

D. RULE 1100(a)(2) AND RULE 1123 OF THE PENNSYLVANIA RULE OF CRIMINAL PROCEDURE DO NOT APPLY TO PETITIONER'S CASE.

No where in the Lower Court proceedings did Petitioner raise any issues pertaining to the Pennsylvania Rules of Criminal Procedure by brief, motion or argument. This issue is being raised by Petitioner before this Court for the very first time. For this reason alone, notwithstanding the fact that the constitutionality of Rules 1100(a)(2) and 1123 have not been raised, the Supreme Court of the United States should not consider this issue for it is not properly before this Honorable Court.

According to the Pennsylvania Judiciary and Judicial Procedure Act of 1976,

27, 1978 (42 PA C.S.A. Sec. 1722), the Supreme Court of Pennsylvania adopted the Pennsylvania Rules of Criminal Procedure, adopted January 31, 1970, effective May 1, 1970; amended effective April 26, 1972; amended September 18, 1973, effective January 1, 1974; June 28, 1974, effective July 1, 1974; January 28, 1983, effective July 1, 1983; July 12, 1985, effective July 1, 1986.

Petitioner has severely misconceived precisely when Rule 1100(a)(2) and Rule 1123 of the Pennsylvania Rules of Criminal Procedure are applicable.

I.

Rule 1100(a)(2) of the Pennsylvania Rules of Criminal Procedure in pertinent part states:

> "Trial in a court case in which a written complaint is filed against

> the defendant, where the defendant is incarcerated, shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed."

Petitioner was not incarcerated at any time from the day he was cited. As set forth in the facts, Petitioner's initial trial was concluded fifty-six (56) days from the time Respondent filed the original complaint. From Petitioner's interpretation of Rule 1100(a)(2) of the Pennsylvania Rules of Criminal Procedure, it is apparent that he is attempting to implicate the time limitation of the rule to an appeal which was effectuated by Petitioner.

The rule does not apply to Petitioner since his initial trial was concluded fifty-six (56) days from the time Respondent filed the original complaint.

Rule 1100(a)(2) of the Pennsylvania Rules of Criminal Procedure does not guarantee that an appeal must be heard before a court within one hundred eighty (180) days.

Petitioner quotes from Commonwealth v. Kugas, 435 A.2d 1293, 1294, 291 Pa. Super. 408 (1981), on page fifteen (15) of his brief as follows:

> "Thus we conclude that summary offenses charged in the same complaint as misdemeanors are part of a court case for purposes of Rule 1100."

Without going into detail, it is obvious that Kugas is not applicable to the present case. There was no combination of a summary offense and a misdemeanor offense charged in the complaint filed by Respondent. On March 5, 1986, Respondent only charged Petitioner with a summary offense in the said complaint. Hence, the

Kugas case is irrelevant.

II.

As mentioned, Supra, Rule 1123 (Post-Verdict Motions) of Pennsylvania Rules of Criminal Procedure is being raised to this Court for the very first time and is, therefore, not properly before it.

Rule 1123(c) states:

> "Upon the finding of guilty, the trial judge shall advise the defendant on the record:
>
> (1) of the right to file post-verdict motions and of the right to the assistance of counsel in the filing of such motions and an appeal of any issues raised therein;
>
> (2) of the time within which he must do so as set forth in paragraph (a); and

(3) that only the grounds contained in such motions may be raised on appeal."

Rule 1123(a) states:

"(a) Within ten (10) days after a finding of guilt, the defendant shall have the right to file written motions for a new trial and in arrest of judgment. Only those grounds may be considered which were raised in pre-trial proceedings or at trial, unless the trial judge, upon cause shown, allows otherwise. Argument, a hearing, or both shall be scheduled and heard promptly after such motions are filed, and only those issues raised and the grounds relied upon in the motions that are stated specifically and with particularity may be argued

or heard. If the grounds asserted do not require a transcript, neither the filing, argument, nor hearing of post-verdict motions shall be delayed for lack of a transcript of the notes of testimony."

The Pennsylvania Rules of Criminal Procedure have a chapter designated for summary proceedings. Rule 90 of the Pennsylvania Rules of Criminal Procedure, (Defects In Form, Content, or Procedure-Summary Cases), in pertinent part states:

"A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of this chapter, unless the defendant raises the defect

before the conclusion of the summary trial and the defect is prejudicial to the rights of the defendant."

Thus, according to Rule 90 of the Pennsylvania Rules of Criminal Procedure, since Petitioner did not raise the issue of Rule 1123 of the Pennsylvania Rules of Criminal Procedure in the prior Court proceedings, he is barred from raising it at this level.

Respondent would also like to bring to the attention of this Court the original Summary Complaint filed against Petitioner with the Housing Court Magistrate, dated March 5, 1986. The bottom right corner of the complaint states, in bold face:

"You have the right to be represented by a lawyer."

There was never any dispute as to whether or not the complaint described

above was properly served according to the Pennsylvania Rules of Criminal Procedure as indicated by the Record. Therefore, upon being served, Petitioner was given notice of his right to be represented by counsel. Such notice occurred prior to the commencement of any Court proceedings. The notice Petitioner received, with regard to counsel, was beyond the minimal requirements of Rule 1123 of the Pennsylvania Rules of Criminal Procedure. Hence, the black letter of Rule 1123 of the Pennsylvania Rules of Criminal Procedure has not been violated.

Respondent finds it difficult to believe that an individual who has, since 1986, filed four (4) separate appeals to the Allegheny County Common Pleas Court, three (3) appeals to the Commonwealth Court of Pennsylvania, a Writ of Allowance to the Pennsylvania Supreme Court, a Request for

Reconsideration to the Pennsylvania Supreme Court, and a Writ of Certiorari to the Supreme Court of the United States without the assistance of legal counsel, was not aware of his right to be represented by counsel. By electing not to employ counsel, Petitioner has willfully waived his rights under Rule 1123 of the Pennsylvania Rules of Criminal Procedure.

Notwithstanding the fact that Petitioner has not raised the constitutionality of Rule 1123 of the Pennsylvania Rules of Criminal Procedure, Respondent respectfully contends that the Supreme Court of the United States should not hear this issue.

CONCLUSION

The Allegheny County Health Department has as its general purpose to preserve and protect the public health. Pursuant to these objectives they adopted certain rules and regulations designed to preserve and promote the public health within Allegheny County.

The regulations of minimum housing standards is a logical and reasonable exercise of its powers and duties.

The facts here are in no way in dispute. The only issue is, whether the Petitioner is guilty of failing to bring his rental property up to certain minimum standards once he had been notified and given reasonable opportunity to do so. The Courts below found he did not.

WHEREFORE, the Allegheny County Health Department respectfully requests this Honorable Court to deny Petitioner's

request for a Writ of Certiorari for lack of jurisdiction or, in the alternative, affirm the decision of the Commonwealth Court of Pennsylvania and find Joseph Slomnicki guilty of the violations on the days cited, and impose the fine of nineteen hundred dollars ($1900.00) plus damages for his delays and double costs pursuant to 28 U.S.C. Section 1912, Act of June 25, 1948, Chapter 646, Section 1, 62 Stat. 954.

Respectfully submitted,

George Janocsko

George Janocsko, Esq.
Counsel of Record

APPENDIX A

28 U.S.C., Section 1912, Damages and Costs on Affirmance:

> "Where a judgment is affirmed by the Supreme Court or a Court of Appeals, the Court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

APPENDIX B

28 U.S.C., Section 1257(a):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, Treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the Treaties or statutues of, or any commission held or authority exercised under, the United States."

I, George Janocsko, do swear that on this 18th day of July, 1990, I have served three (3) copies of this Brief in Opposition on each party to this proceeding. Such service was done by sending said documents by First Class Mail, postage prepaid, with the United States Post Office, pursuant to 28 U.S.C. Section 1746. The name and address of the party served is:

Joseph Slomnicki
5877 Darlington Road
Pittsburgh, PA 15217

I, George Janocsko, also swear that Petitioner personally served the Writ of Certiorari Brief to my office in care of Robert Borgoyn on June 20, 1990, not May 29, 1990, as Petitioner's sworn statement indicates.

George Janocsko
George Janocsko, Esq.
Counsel of Record

Sworn to before me this 18th day of July, 1990
Patricia E. Sullivan

Notarial Seal
Patricia E. Sullivan, Notary Public
Pittsburgh, Allegheny County